

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MAXINE HENRY,

Claimant,

v.

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,

Defendant.

IC 2004-508000

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Filed: April 12, 2007

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Lewiston, Idaho, on October 13, 2006. Thomas B. Amberson of Lewiston represented Claimant. Thomas W. Callery of Lewiston represented Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF). Claimant entered into a lump sum settlement with Employer and Surety prior to the hearing. The parties submitted oral and documentary evidence. Post-hearing briefs were filed, and the matter came under advisement on January 25, 2007. The case is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided were:

1. Claimant's average weekly wage;
2. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine;
3. Whether ISIF is liable under Idaho Code § 72-332; and

4. Apportionment under the *Carey* formula.

Subsequent to the hearing, it became apparent that the parties were in agreement that Claimant was an odd-lot worker and entitled to permanent and total disability on that basis. ISIF's liability, *Carey* apportionment, and Claimant's average weekly wage for purposes of calculating disability benefits, remain at issue.

CONTENTIONS OF THE PARTIES

Claimant asserts that at the time she went to work for Employer, she had permanent impairment resulting from two prior cervical fusions and a knee injury; that these impairments were manifest; and that the impairments were a hindrance to her employment. Claimant argues that the low back injury she sustained on April 1, 2004, combined with her pre-existing impairments to render her permanently and totally disabled, making ISIF liable for some portion of her permanent total disability.

ISIF agrees that Claimant's cervical impairments were pre-existing, manifest, and a hindrance to her employment. ISIF argues, however, that Claimant is an odd-lot worker solely as a result of her last accident and not because her most recent injury combined with her pre-existing injuries. Failure to meet the "combined with" requirement relieves ISIF of any liability for Claimant's disability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Deb Uhlenkott, Brian McDaniel, and Nancy Collins, Ph.D., taken at hearing;

2. Joint exhibits 1 through 15 and 17 through 19¹ admitted at hearing; and
3. Claimant's exhibits 20 through 22 admitted at hearing.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 60 years of age. She was unmarried and had no children living at home.

RELEVANT PRIOR HISTORY

2. In 1987, Claimant underwent a cervical discectomy and fusion at C5-6 and C6-7 as a result of a November 1986 work accident.

3. Subsequent to her 1987 cervical fusion, Claimant completed the coursework and certification to become a certified nurse assistant (CNA).

4. In January 2000, while working as a CNA, a patient fell on Claimant, who sustained a torn meniscus in her left knee and a second cervical injury as a result. The injuries resulted in a fusion at C4-5, and left knee surgery.

5. Although Claimant was awarded 1% whole person impairment for her surgically-repaired left knee, Claimant made a full recovery, and her knee did not cause her any difficulty or restrict her activities in any way.

6. A year after her second cervical injury, Claimant was evaluated by J. Gerald McManus, M.D. He rated her whole person impairment for both cervical injuries at 20%, of which he apportioned 15% to her first fusion, and 5% to her second fusion. Permanent

¹ Joint Exhibit 16, the report of Douglas Crum, C.D.M.S., the vocational expert retained by Employer/Surety, was not available. Pursuant to agreement of the parties, Exhibit 16 appears in the record as a blank exhibit.

restrictions, based solely on her cervical injuries, included lifting a maximum of 40 pounds to chest level, 20 pounds to shoulder level occasionally, and 10 pounds above the shoulder with both hands only rarely.

7. Claimant returned to her work as a CNA doing in-home care following recovery from her second cervical fusion. Although she had some restrictions, she was able to work full-time, more than forty hours per week, with patients that did not require lifting or transfers, until her April 1, 2004, injury.

APRIL 1, 2004 ACCIDENT AND TREATMENT

8. On April 1, 2004, Claimant sustained a low back injury while at work. Claimant received extensive conservative treatment for the low back injury, including physical therapy, medial branch blocks, and radiofrequency thermocoagulation, all without receiving long-term relief. Claimant was referred to a surgeon for a consult, and ultimately it was determined that she was not a surgical candidate. Claimant continues to suffer severe constant pain that is only partially controlled with a TENS unit, Vicodin, and methadone.

9. Claimant takes Vicodin every day and methadone for break-through pain. She cannot drive when she takes the narcotic pain medication. Claimant has not worked as a CNA since May 2005. Her income is limited to social security benefits, and the operation of a long-term storage business that Claimant and her son operate.

10. Claimant and Defendant both retained vocational experts who testified at the hearing. Deb Uhlenkott, retained by Claimant, and Nancy Collins, Ph.D., retained by ISIF, both testified that Claimant is permanently and totally disabled as an odd-lot worker.

DISCUSSION AND FURTHER FINDINGS

ISIF LIABILITY

11. The determination that Claimant is totally and permanently disabled leads to the real issue in this dispute -- whether ISIF is liable for a portion of Claimant's total disability benefits. Under Idaho Code § 72-332, ISIF pays a portion of income benefits for workers who have preexisting impairments, then sustain a permanent injury in a subsequent industrial accident, and the combination of the preexisting impairment and the subsequent injury combine to render the worker totally and permanently disabled. This provision encourages the employment of individuals with preexisting impairments by relieving their current employer from 100% of the liability in the event the worker becomes totally and permanently disabled as a result of an industrial accident with that employer.

12. There are four requirements that must be met in order for a claimant to establish ISIF liability under Idaho Code § 72-332.

- There must be a preexisting impairment; and
- The impairment must be manifest; and
- The impairment must constitute a subjective hindrance to employment; and
- The impairment must combine with the subsequent injury to cause total permanent disability.

Dumaw v. J. L. Norton Logging, 118 Idaho 150, 155, 795 P.2d 312, 317 (1990). Defendant concedes that Claimant's knee injury was pre-existing and manifest, but denies that it constituted a hindrance to employment or "combined with" the last accident. The parties agree that Claimant's cervical injuries were pre-existing, manifest, and a hindrance to employment, but disagree as to the "combined with" requirement.

Hindrance To Employment

13. In *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990), the Idaho Supreme Court held that whether a preexisting condition met the statutory test depended upon whether the impairment was a hindrance or obstacle to employment *for the particular claimant*. Nothing in the record supports such a finding in this case. Dr. McManus imposed no work restrictions related to Claimant's knee, and she testified that it didn't impact her ability to work as a CNA.

Combined With

14. To satisfy the "combined with" requirement of I.C. § 72-332(1), a claimant must show that *but for* the preexisting impairments, he would not have been totally permanently disabled. *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P. 2d 1973 (1989). Although the "combined with" requirement of Idaho Code § 72-332 has generated a number of appellate decisions, most of the litigated cases have involved two ISIF defenses: 1) where the claimant was already totally and permanently disabled as an odd-lot worker prior to the most recent industrial injury; and 2) where the Claimant became totally and permanently disabled solely as a result of the most recent industrial injury. The instant case falls into the latter category. The Court has carefully laid out a framework for analyzing this situation and determined that it does not satisfy the "combined with" requirement. See, *Eckhart v. State*, 133 Idaho 260, 985 P.2d 685 (1999).

15. Claimant has failed to carry her burden of proving that her pre-existing cervical impairments combined with her last injury to leave her permanently and totally disabled. The record does not support the existence of a "but for" relationship between the cervical impairments and Claimant's low back injury. After her second cervical fusion, Claimant

continued to work more than forty hours per week as a CNA. She had reduced range of motion in her neck following the two fusions, but that did not stop her from driving, working forty or more hours per week, shopping, cooking, cleaning, working on her crafts, or any other activities of daily living. As Ms. Uhlenkott wrote in her report, “[p]rior to the industrial injury of April 1, 2004, [Claimant] was very physically active and did not need to pace herself to get through her day.” Ex. 14, p. 3. Claimant confirmed this statement at hearing. Tr., p. 55.

The medical records documenting Claimant’s treatment following the April 2004 accident focus on her low back, and provide no basis for Claimant’s contention that she was being treated for *both* low back *and* cervical pain. Claimant herself reported to Lyndal Stoutin, M.D., that “. . . she has had a lot of pain in her life. She’s had two cervical fusions and states this problem [her low back pain] is much worse and more life limiting than any thing [sic] she has had in the past.” Ex. 1, p. 1. It was Claimant’s low back pain, not neck pain, that Claimant’s long course of conservative treatment attempted to resolve. And it was Claimant’s low back pain that required daily narcotics, limited her work hours, prevented her from driving, affected her sleep, and limited her ability to stand and walk.

16. The reports and testimony of both vocational experts supports a finding that it was Claimant’s last injury alone that caused her disability. Ms. Uhlenkott prepared her report in July 2005, before ISIF was joined in the action and the “combined with” requirement was at issue. In reaching her conclusions, Ms. Uhlenkott relied *only* upon medical records that were created *subsequent* to Claimant’s April 1, 2004 injury. She was unaware of Claimant’s pre-2004 restrictions, and testified that after Claimant’s second cervical injury in 2000, “. . . she had, in fact, gone back to work as a nurse aid and was performing her job full duty . . .” until the April 1, 2004 accident. Tr., p. 65. Ms. Uhlenkott’s opinion that Claimant was an odd-lot worker was

based solely on the effects of Claimant's *last accident*. Although Claimant attempted to elicit testimony from Ms. Uhlenkott to support the "combined with" requirement, the limitations inherent in her involvement in the case prevented her from opining with any authority on the issue.

Ms. Collins demonstrated in her report and her testimony that she had a firm grasp of Claimant's situation both before *and* after her April 2004 accident. Ms. Collins had the benefit of reviewing extensive medical records both pre- and post-2004 injury. She compared restrictions imposed as the result of each accident. Ms. Collins' opinion was unequivocal that it was Claimant's chronic low back pain, which necessitated daily use of narcotic analgesics, that caused Claimant's disability as an odd-lot worker.

AVERAGE WEEKLY WAGE/CAREY APPORTIONMENT

17. Because the Referee finds that ISIF has no liability pursuant to Idaho Code § 72-332, the issues of average weekly wage and *Carey* apportionment are moot.

CONCLUSIONS OF LAW

1. ISIF has no liability under Idaho Code §72-332 for Claimant's permanent and total disability.
2. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 29 day of March, 2007.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of April, 2007 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

THOMAS B AMBERSON
PO BOX 607
LEWISTON ID 83501-0607

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501-0854

djb

/s/ _____

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STATE OF IDAHO, INDUSTRIAL
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Defendant.

IC 2004-508000

ORDER

Filed: April 12, 2007

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. ISIF has no liability under Idaho Code §72-332 for Claimant's permanent and total disability.
2. All other issues are moot.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 12 day of April, 2007.

INDUSTRIAL COMMISSION

/s/ _____
James F. Kile, Chairman

/s/_____
R.D. Maynard, Commissioner

/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of April, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

THOMAS B AMBERSON
PO BOX 607
LEWISTON ID 83501-0607

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501-0854

djb

/s/_____